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COURT OF CRIMINAL APPEALS
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IN THE
COURT OF CRIMINAL APPEALS FOR THE
STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

DAMON LAVELLE ASBERRY,

APPELLANT

V.

THE STATE OF TEXAS

AN APPEAL OF A FINDING UNDER ARTICLE 64.04, CODE OF CRIMINAL PROCEDURE
CAUSE NO. 2007-1623-C2A
FROM THE 54TH JUDICIAL DISTRICT COURT OF
MCLENNAN COUNTY, TEXAS

STATE'S BRIEF

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Identity of Parties and Counsel

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Statement of the Case

This is an appeal of a finding under Texas Code of Criminal Procedure Article 64.04. On November 21, 2014, the trial court held a hearing on Appellant's motion for DNA testing, and entered its finding on January 15, 2015 that, by a preponderance of the evidence, it was not reasonably probable that Appellant would not have been convicted had the results of the DNA testing been available at his trial.

Statement Regarding Oral Argument

The State does not request oral argument. The State believes that the facts and legal arguments are adequately presented in the record and briefs, and that oral argument will not significantly aid the Court in its decisional process.

Issue Presented

Whether the Court of Appeals erred in failing to consider the conflict between the new test results and the results presented at trial, as well as the defensive evidence presented by Appellant, when deciding whether the new test results cast doubt on the validity of the conviction.

Summary of Argument

In a hearing conducted pursuant to Texas Code of Criminal Procedure Article 64.04, the Appellant failed to establish by a preponderance of the evidence that it was reasonably probable that he would not have been convicted had the results of new DNA testing been available at his trial.

Statement of Facts

Appellant filed an action pursuant to Texas Code of Criminal Procedure Chapter 64, seeking post-conviction DNA testing. (CR I – 4).[1] The court entered an order for testing based, in part, on the "agreement of the parties." (CR I – 26). In making its order, the court cited to Texas Code of Criminal Procedure Article 64.01, *et seq.*, but did not make the specific findings required under Texas Code of Criminal Procedure Article 64.03.

On November 21, 2014, the court held a hearing regarding the results of the testing. (RR III). The only witness called was Erin Casmus, a forensic scientist for the Waco DPS lab. (RR III – 8). Pursuant to the court's testing order, Ms. Casmus analyzed four items: a swab from a car seat cushion, a sample from a car seat cushion, and two swabs from a shirt. (RR III – 9).

Item 4-T4 was identified as a cutting from the car seat cushion. (RR III – 13). Ms. Casmus was able to obtain DNA from this exhibit but was unable to get profiles from the three other exhibits. (RR III – 15-16). Analytical results from item 4-T4 available at the time of trial could not exclude Appellant; Bryan Daugherty, the victim; or Appellant's brother as contributors of the DNA. (RR III – 13; TR VII – 93). Ms. Casmus testified

[1] Citations to the record are designated as follows:
Clerk's Record of Chapter 64 proceedings: "CR"
Reporter's Record of Chapter 64 proceedings: "RR"
Reporter's Record of Original Trial: "TR"

that the probability of a match based on the original testing was 50/50, which she agreed was a "pretty low probability." (RR III – 15; TR VII – 82).

Ms. Casmus was able to obtain a mixture profile from 4-T4. (RR III – 15). She determined that the profile was a mixture consistent with at least three contributors. (RR III – 16). She was able to eliminate both Appellant and Bryan Daugherty as contributors. (RR III – 16).

Ms. Casmus described the sample as being a cutting from the cloth seat cover of the vehicle. (RR III – 19). She agreed with the State's attorney's characterization that the sample was approximately ¾ inch by ¾ inch. (RR III – 19). She later described the cutting as being approximately one inch by one inch. (RR III – 20). Ms. Casmus testified that the sample had come from a cutting from the car seat which included the entire perimeter of a particular stain. (RR III – 20). She did not know if the cutting she tested came from the precise location which had been previously tested. (RR III – 19-20). Ms. Casmus testified that the cutting was of a stain that had presumptively tested positive for blood. (RR III – 20). However, Ms. Casmus was not able to see a stain on the material with her naked eye. (RR III – 22). Ms. Casmus did not know how the DNA had been deposited onto the sample. (RR III – 19).

In closing, Appellant's counsel allowed that the trial testimony had not left "much doubt that Mr. Asberry and the victim had been together at some point in time up until about three o'clock in the morning. I think he was found at five o'clock." (RR III – 23; TR V – 91-94; TR V – 34).

Appellant's counsel also characterized the evidence as showing some dispute about the vehicle that was used by the parties and whether the victim was stabbed inside the vehicle or outside the vehicle. (RR III – 23-24; TR VI – 89-96, 160-164; TR VII – 132-133). Thus, Appellant argued, the presentation of the DNA evidence at trial showing a match with the DNA indicated the jury could conclude that the victim had been in the vehicle. (RR III – 24). The court corrected counsel, stating that "there was nothing ever that there was a match. It just couldn't exclude…." (RR III – 24; TR V – 80).

The State argued that the DNA evidence presented at trial was of low significance because the testing at the time showed that half the population could have contributed the sample. (RR III – 26). State's counsel referenced the Court of Appeals opinion on direct appeal, which noted that the DNA evidence presented at trial did not link Appellant with the crime. (RR III – 26-27; *Asberry v State*, No. 10-08-00237-CR, 2009 WL 3646083, at *5 (Tex. App. – Waco Nov. 4, 2009)).

The State then reviewed the evidence presented at trial supporting the jury's guilty verdict. Christy Kelly had testified about helping Appellant on over a hundred occasions to pick up young men and ply them with drugs and alcohol, so that he could have sex with them after they passed out. (RR III – 27; TR IX – 64-74).

Freddy Gomez had testified that Appellant had picked him up, driven him to Groesbeck, and tried to have sexual contact with him. (RR III – 27;

TR IX – 77-82). When Gomez refused his advances, Appellant had gotten violent. (RR III – 27; TR IX – 83).

Evidence had been presented that Appellant had missed work the day after the murder. (RR III – 27; TR VII – 9). Appellant had also shown consciousness of guilt, telling associates that he was the prime suspect in the murder before he was ever contacted by the police. (RR III – 27; TR VI – 52, 65, 71; TR VII – 13).

The car from which the DNA was recovered had been fire-bombed after it was seized and placed in the police impound, which strongly suggested an attempt to tamper with the evidence. (RR III – 28; TR VI – 116).

The medical examiner testified that the victim's lung had been pierced, which causes a popping sound. (RR III – 28; TR VI – 21). This corroborated Reagan Prietto's testimony that Appellant told him that he had heard a popping sound when he stabbed Daugherty. (RR III – 28; TR VIII – 40-41). Appellant also told Prietto that he had stabbed the Daugherty "two or three times," which was corroborated by the medical examiner's finding that Daugherty had suffered two stab wounds. (RR III – 28; TR VIII – 41).

Testimony was presented showing that the vehicle had been cleaned and detailed shortly after the murder, and that police investigators had discovered a foul odor and red, soapy water in the vehicle; again showing an attempt to destroy evidence. (RR III – 29; TR VI – 97, 99, 111, 147-151; TR VIII – 42).

The State's position was the new DNA findings did not counter the other trial evidence which proved Appellant's guilt of murdering Bryan Daugherty; it merely showed that three unknown subjects had contributed to a DNA profile found in a car. (RR III – 29-30).

Findings

The judge who presided at Appellant's trial also presided over the Chapter 64 hearing. (CR I – 41). In his findings, the court noted that no evidence was adduced relating to the factors that would affect whether a particular person's DNA would be left at a crime scene or the likelihood that a particular person's DNA would be recovered from a crime scene. (CR I – 41).

The court noted that the testing done at the time of trial could not exclude the Appellant or Daugherty, and the profile would have matched half of the general population. (CR I – 41). The State had conceded at trial that the DNA evidence was weak. (CR I – 41). Further, the defense at trial had presented testimony and argued that nothing definitively linked Daugherty with the cut from the car seat. (CR I – 41). The opinion on direct appeal had further noted the weakness of the DNA evidence presented at trial, and that it did not conclusively link Appellant with the crime. (CR I – 41).

The court then noted that the other evidence presented at trial was strong. (CR I – 42). Appellant had confessed the crime to two separate jail inmates. (CR I – 42; TR VI – 127; TR VIII – 33). Appellant's confession to

Jason Donaldson was corroborated by the facts that Appellant and the victim had been smoking outside of Appellant's house (TR VII – 131), that Appellant provided the victim drugs in the hope of getting sexual favors (TR VII – 134), and that the stabbing had occurred in Waco (TR VII – 133). Appellant's confession to Reagan Preatto was corroborated by the facts that Appellant had provided drugs for sex (TR VIII – 38), that he had detailed the car after the murder (TR VIII – 42), that he had stabbed the victim two or three times (TR VIII – 41), and that when he stabbed the victim he heard a popping sound (TR VIII – 40-41). (CR I – 42).

Christy Kelly had testified to Appellant's *modus operandi* of luring young men with drugs and alcohol and taking sexual advantage of them when they were too intoxicated to resist. (CR I – 42; TR IX – 64-74). Freddy Gomez confirmed that he was one of Appellant's targeted victims, and that when he resisted his advances, Appellant became aggressive and violent. (CR I – 43; TR IX – 79-83).

Appellant did not go to work the day after the murder, telling coworkers he had gotten into a fight. (CR I – 43; TR VII – 9). He later told coworkers that he was a suspect in the murder, before he was ever contacted by the police. (CR I – 43; TR VI – 52, 58; TR VII – 13). He also told his coworkers that he had a knife. (CR I – 43; TR VI – 52, 58).

The vehicle where the DNA was recovered had been cleaned shortly after the murder. (CR I – 43; TR VI – 147-151). An investigating officer found soapy bloody water in the rear of the vehicle. (CR I – 43; TR VI – 99).

After the vehicle was impounded, it had been firebombed. (CR I – 43; TR VI – 116).

Direct Appeal

Appellant appealed the trial court findings, presenting the sole issue of whether the trial court erred in finding that there was not a reasonable probability that Appellant would have been acquitted had the new test results been know at the time of trial. *Asberry v. State,* No. 10-15-00032-CR, 2017 WL 4697799 at *2 (Tex. App. – Waco Oct. 18, 2017). Upon reviewing the complete record, the Court of Appeals disagreed with Appellant's assessment of the record and the impact of the new DNA test results. *Id.* In overruling Appellant's sole issue, the Court of Appeals found that, although the new results affirmatively excluded both Appellant and Daugherty as possible contributors to the DNA tested, the results did not cast an affirmative doubt on the validity of the conviction. *Id.* at *4. In light of the evidence presented at trial and the facts necessary to prove guilt, Appellant had failed to show by a preponderance of the evidence that he would not have been convicted had the new results of the DNA test been available at trial. *Id.* Thus, it could not be concluded that the trial court had erred in making an unfavorable finding. *Id.*

Law Applicable to the Case

When reviewing a trial court's finding in a Chapter 64 proceeding as to whether it is reasonably probable that the person would not have been convicted, the appellate court uses the same standard applied to review a

trial court's ruling granting or denying DNA testing under article 64.03. *See Tex. Code Crim. Proc.* arts. 64.03, 64.04; *Asberry v. State*, 507 S.W.3d 227, 228–29 (Tex. Crim. App. 2016). This is the bifurcated standard of review articulated in *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). The reviewing court gives almost total deference to the judge's resolution of historical fact issues supported by the record and applications-of-law-to-fact issues turning on witness credibility and demeanor and reviews *de novo* all other application-of-law-to-fact questions. The appellate court reviews the entire record, including all of the evidence that was available to, and considered by, the trial court in making its ruling, including testimony from the original trial. *Asberry*, 507 S.W.3d 227at 228. The ultimate question of whether a reasonable probability exists that exculpatory DNA tests would have caused the appellant to not be convicted is an application-of-the-law-to-fact question that does not turn on credibility and demeanor and is therefore reviewed *de novo. Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002).

The appellant must prove that, had the results of the DNA test been available at trial, there is a 51% chance that the defendant would not have been convicted. *Glover v. State*, 445 S.W.3d 858, 861 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd); *Medford v. State*, No. 02-15-00055-CR, 2015 WL 7008030, at *3 (Tex. App.—Fort Worth Nov. 12, 2015, pet. ref'd) (mem. op., not designated for publication). A defendant is not required to establish actual innocence to be entitled to a favorable finding. *Glover* at 862.

However, relief is not warranted where the effect of exculpatory DNA evidence is to "merely muddy the waters." *LaRue v. State*, 518 S.W.3d 439, 446 (Tex. Crim. App. 2017).

Argument

The case at bar concerns only post-conviction DNA testing under Chapter 64. It is not a comprehensive habeas matter pursued under Texas Code of Criminal Procedure Article 11.07. As such, the matter to be determined is more narrowly defined under Chapter 64 than under the general habeas corpus statute. This narrow question is simply whether the new DNA test results establish, by a preponderance of the evidence, that there was a reasonable probability that the applicant would not have been convicted because of DNA test results.

At the time of trial, the DNA test on the inch square cut from the vehicle's back seat showed a 50/50 possibility that the contributor was either the Appellant or the victim. It did not show when or how the DNA was deposited there. The new testing showed that DNA from three or more contributors, none of whom was the Appellant or the victim, was deposited on the inch square cutting. Nor did this testing reveal when or how the DNA was deposited.

The trial evidence clearly showed that Appellant and Daugherty were together the night of the murder. Christy Kelly and Freddy Gomez established Appellant's *modus operandi* of seducing young men with drugs and alcohol. Appellant told Reagan Preatto that he heard a popping sound

when he plunged his knife into the victim's lung, a phenomenon confirmed by the medical examiner.

The trial court found, and the Court of Appeals agreed, that the new DNA findings did not overcome the great weight of the other evidence of Appellant's guilt. The DNA evidence at trial supported only the proposition that sometime during the course of events the Appellant and/or the victim were in Appellant's car, and only weakly at that. This issue was only tangential to the central issue of the case, that being whether Appellant killed the victim.

The new DNA testing showed only that neither Appellant nor the victim contributed to the DNA profile on the car seat cutting. If anything, the result showing profiles from three other subjects supported Kelly's and Gomez' accounts of Appellant's *modus operandi* in seducing scores of young men with drugs and alcohol.

Appellant's argument for a favorable finding ignores key points of the trial evidence such as the signature evidence of a popping noise as the victim was stabbed; Appellant's consciousness of guilt shown by his having the car cleaned shortly after the murder, the presence of bloody soapy water and a foul stench in the back of the vehicle, the fact that someone had firebombed the car after it was in the police impound, and Appellant telling co-workers that he was a suspect before he was ever contacted by the police; Appellant's absence from work the day after the

murder; and the fact that the evidence fit with Appellant's *modus operandi* in seducing young men.

Appellant complains that, despite the overwhelming evidence of his guilt aside from the DNA results, the Court of Appeals ignored the defensive evidence presented at trial. (*Appellant's Brief* at 11). Appellant specifically points to Brandon Turner's admission to committing the offense and Appellant's alibi evidence that he was home when the murder was committed. True, the Court of Appeals did not directly address such evidence. However, its opinion clearly infers that Appellant's competing theories were negligible compared with the overwhelming inculpatory evidence. The Court of Appeals did in fact address the credibility of the jailhouse informants' testimony, finding it reliable because they both knew facts that only the killer would know. *Asberry v. State,* No. 10-15-00032-CR, 2017 WL 4697799 at *3 (Tex. App. – Waco Oct. 18, 2017).

Appellant suggests that when a court relies on evidence of guilt to negate exculpatory DNA results, such evidence must be compelling, relying on *Dunning v. State*, 544 S.W.3d 912 (Tex. App. 2018), *petition for discretionary review granted* (June 20, 2018). Whether a "compelling evidence" standard should be adopted for all Chapter 64 cases is an open question; undoubtedly the evidence at bar meets such a standard.

The facts of *Dunning*, a sexual assault case, concerned DNA results obtained from intimate areas of the victim's shorts. The meaning of

competing DNA results in such a case is a fairly straight forward analysis: whether DNA found in, on, or near the victim's genitals shows who sexually assaulted the victim. The issue at bar is an entirely different stripe of cat: whether DNA results obtained from a one-inch square of car upholstery shows who killed Bryan Daugherty.

The facts at bar are more akin to the Court's line of cases dealing with criminal homicide, rather than sexual assault, such as *Ex parte Holloway*, 413 S.W.3d 95 (Tex. Crim. App. 2013) (per curiam); and *Whitaker v. State*, 160 S.W.3d 5 (Tex. Crim. App. 2004). In such cases, even DNA analysis of a murder weapon could be meaningless under facts of the case. *Whitaker* at 9.

A reasonable probability of innocence does not exist if there is sufficient evidence, independent of the DNA evidence in question, to establish an applicant's guilt. *Cate v. State*, 326 S.W. 3d 388, 390 (Tex. App. – Amarillo 2010, *pet. ref'd*). Also, a test result that excludes the applicant as a contributor may not warrant a favorable finding under Chapter 64 when other evidence substantially links the applicant to the offense. *See, Solomon v. State*, No. 02-13-00593-CR, 2015 WL 601877, at *5 (Tex. App. – Fort Worth Feb. 12, 2015 *no pet.*) (not designated for publication); *Sanchez v. State*, No. 05-05-00400-CR, 2006 WL 620254, at *3 (Tex. App. – Dallas Mar. 14, 2006 *pet. ref'd*) (not designated for publication).

On the basis of the entire state of the evidence, which proved Appellant's guilty beyond a reasonable doubt regardless of any DNA results or lack thereof, it cannot be concluded that the trial court erred in finding that the new DNA test results were not favorable to Appellant. The effect of the exculpatory DNA evidence in this case is to "merely muddy the waters" and relief is simply not warranted. *LaRue* at 446.

Prayer

For the foregoing reasons, the State of Texas prays that this Honorable Court affirm the finding of the court below, and prays for such other and further relief as may be provided by law.

Respectfully Submitted:
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Certificate of Service

I certify that I caused to be served a true and correct copy of this State's Brief by efile on Applicant's attorney of record, Walter M. Reaves, Jr. at walterreaves@att.net.

DATE: 6/26/18

/S/ STERLING HARMON_____

STERLING HARMON